In the Supreme Court of the United States.

OCTOBER TERM, 1911.

HAMILTON H. HENDRICKS, PLAINTIFF IN error, *v.* UNITED STATES.	No. 164.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

BRIEF FOR THE UNITED STATES.

STATEMENT.

Plaintiff in error was convicted of subornation of perjury. The facts are stated in the brief filed by his counsel.

The case comes here on an alleged constitutional question of the sufficiency of the indictment under the sixth amendment.

Error is also assigned to certain rulings and instructions of the trial court.

ARGUMENT.

I.

The indictment sufficiently informed the accused of the "nature and cause of the accusation" against him.

The indictment specified:

1. The name of the person whom the defendant was charged with having suborned.

2. The time and place of the subornation.

3. The identity of the tribunal before which the perjury was to be committed.

4. The place and time in which the tribunal was to sit, and

5. Exactly what false testimony the person was suborned to give.

The sufficiency of the indictment as to these points is not attacked, but it is claimed that the defendant was not adequately advised as to the identity of the proceeding in which the perjury was to be committed. The description of this proceeding was as follows:

> * * * Sitting as a grand jury * * * and, among other matters, inquiring into certain criminal violations of the laws of the said United States relating to the public lands and the disposal of the same, and the unlawful fencing thereof, which had then lately before been committed within the said district.

This would seem to locate the matter sufficiently for all practical purposes, for the defendant could have had no difficulty in discovering from the face

The other alleged failure in definiteness is that the indictment does not specify in just what evidenciary way the perjured testimony was to be material, the indictment having said merely:

> And it then and there * * * became and was a material question whether * * *

Exactly this form of allegation has always been held sufficient. The point was directly decided and the authorities reviewed in *Markham* v. *U. S.* (160 U. S., 324, 325, *supra*), where the court said:

> It was not necessary that the indictment should set forth all the details or facts involved in the issue as to the materiality of such statement, and the authority of the Commissioner of Pensions to institute the inquiry in which the deposition of the accused was taken. In 2 Chitty's Criminal Law, 307, the author says: "It is undoubtedly necessary that the false allegations that it should appear on the face of the indictment were material to the matter in issue. But it is not requisite to set forth all the circumstances which render them material; the simple averment that they were so will suffice." In *King* v. *Dowlin* (5 T. R., 311, 317) Lord Kenyon said that it had always been adjudged to be sufficient in an indictment for perjury to allege generally that the particular question became a material question. So, in *Commonwealth* v. *Pollard* (12 Met., 225, 229), which was a prosecution for perjury, it was said that it must be alleged in the indictment that the matter

sworn to was material, *or* the facts set forth as falsely and corruptly sworn to should be sufficient in themselves to show such materiality. In *State* v. *Hayward* (1 Nott. & McCord, 546, 553), which was also a prosecution for perjury, the court, after observing that it should appear on the face of the indictment that the false allegations were *material* to the matter in issue, adjudged that it was not necessary "to set forth all the circumstances which render them material; the simple averment that they became and were so will be sufficient." Many other authorities are to the effect that the substance of the offense may be set forth without encumbering the indictment with a recital of its details and circumstances.

See also *U. S.* v. *Howard* (132 Fed. Rep., 325, 359); *U. S.* v. *Ammerman* (176 Fed. Rep., 637); *Com.* v. *McCarty* (152 Mass., 577); *Wharton Crim. Law,* 10th Ed., sec. 1304; *30 Cyc. L. & Proc.,* p. 1435, where are collected a great number of decisions.

II.

Such objections, even if originally valid, would not survive verdict.

There was no motion to quash.

The demurrer did not include this ground. (R., p. 9.)

The point was nowhere made until after verdict, when it was presented on motion in arrest of judgment. (R., p. 17.)

The time has long since passed (if it ever was) when a defendant could sit by until he had been tried and convicted and then assert (now seven years after the filing of the indictment) that he had not known enough about the charge to prepare for trial. If in fact he had been substantially hampered in that respect, he would surely have known his discomfort at the time it existed. The law seems to be entirely fair in assuming that no obstruction to the defendant could be really substantial if it were not sufficiently obstructive for him to have observed it.

The case is therefore one of those contemplated by R. S., sec. 1025.

Holmgren v. *U. S.*, 217 U. S., 509, 523.
Armour Packing Co. v. *U. S.*, 209 U. S., 56.
Connors v. *U. S.*, 158 U. S., 408, 411.
Serra v. *Mortiga*, 204 U. S., 470, 475 and note.
Grey v. *U. S.*, 172 Fed. Rep., 101 (C. C. A. 7th C.).
Hardesty v. *U. S.*, 168 Fed. Rep., 25 (C. C. A., 6 C.). (Opinion by Judge (now Justice) Lurton.)
Rosen v. *U. S.*, 161 U. S., 29, 34, *supra*.
Markham v. *U. S.*, 160 U. S., 319, 324–325, *supra*.

III.

The materiality of the false oath to the proceeding was proved at the trial.

The testimony of Francis J. Heaney, the assistant United States attorney, proved clearly the mate-

riality in fact of the suborned testimony. (R., pp. 30–31.)

IV.

The judgment should be affirmed.

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January, 1912.

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